Supreme Court, U.S.
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No. 01 501

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2000

PETER ASSENATO,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition for Writ of Certiorari to the
Appellate Court of Illinois,
First Judicial District

PETITION FOR WRIT OF CERTIORARI

FREDERICK F. COHN
601 S. LaSalle St.
Suite 700
Chicago, IL 60605
(312) 641-0692
Attorney for
Petitioner

DENNIS DOHERTY
601 S. LaSalle St.
Suite 700
Chicago, IL 60605
(312) 580-0935
Of Counsel

21 pp

QUESTIONS PRESENTED

1. (A) Is the refusal of Illinois courts to allow petitioner any hearing on his claims of newly-discovered evidence and actual innocence, including a recantation from the sole witness who provided any direct evidence against petitioner, a violation of the substantive and procedural Due Process provisions of the Fourteenth Amendment?

(B) Was Due Process violated when the State trial and reviewing courts denied petitioner a hearing to prove the reliability of evidence that proves his actual innocence -- the recantation of the State's "star" witness -- on the premise that recantation testimony is unreliable?

(C) Does this violate Due Process as per the rule of Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297 (1973), that the reliability of a witness's extrajudicial statements must be tested by an evidentiary hearing?

PARTIES INVOLVED

Petitioner, Peter Assenato, was the defendant-petitioner in the Circuit Court of Cook County, Illinois; the Appellant in the Appellate Court of Illinois; and the Petitioner in the Illinois Supreme Court.

Respondent, People of the State of Illinois, was the plaintiff-respondent in the Circuit Court of Cook County; the Appellee in the Appellate Court of Illinois; and the Respondent in the Illinois Supreme Court.

TABLE OF CONTENTS

Page

Questions Presented..... i

Parties Involved..... ii

Table of Contents..... iii

APPENDICES..... iv

Table of Authorities Cited..... v

Prayer for Certiorari..... 1

Opinions and Orders Below..... 1

Jurisdictional Statement..... 4

Constitutional Provision Involved..... 5

Statement of the Case..... 6

Statement of Facts..... 6

Raising the Federal Question..... 8

Reasons for Granting Certiorari..... 9

Certiorari should be allowed, because the State trial and reviewing courts denied defendant a hearing to prove the reliability of evidence that proves his actual innocence -- the recantation of the State's "star" witness -- on the premise that recantation testimony is unreliable.

This violates Due Process as per the rule of Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297 (1973), that the reliability of a witness's extrajudicial statements must be tested by an evidentiary hearing.

The refusal of Illinois courts to allow defendant any hearing on his claims of newly-discovered evidence and actual innocence, including a recantation from the sole witness who provided any direct evidence against defendant, violates defendant's rights to substantive and procedural Due Process per the Fourteenth Amendment.

Conclusion.....14

APPENDICES:

App. A through App. O are submitted in a Separate Volume Appendix pursuant to Supreme Court Rule 14.1(i).

TABLE OF AUTHORITIES CITED

Page

Cases

California v. Trombetta, 467 U.S. 479, 81 L.Ed.2d 413 (1984).....11

Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297, 312 (1973).....9-13

Crane v. Kentucky, 476 U.S. 683, 90 L.Ed.2d 636 (1986).....11

Davis v. Alaska, 415 U.S. 308, 39 L.Ed. 2d 347 (1974).....10, 12

Davis v. Lane, 814 F.2d 397 (7 Cir. 1987).....13

Herrera v. Collins, 506 U.S. 390, 122 L.Ed.2d 203 (1993)....10-11, 11

Morrison v. Mitchell, 96 Ill.App.2d 332, 239 N.E.2d 289 (3 Dist. 1968)....11

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 94 L.Ed. 865 (1950).....13

Rogers v. Richmond, 365 U.S. 534, 5 L.Ed.2d 760 (1961).....11, 12

Washington v. Texas, 388 U.S. 14, 18 L.Ed.2d 1019 (1967).....11

Constitutional Provision

The Due Process Clause of the Fourteenth Amendment to the United States Constitution.....passim

Statutes and Rules

28 U.S.C. 1257(a).....4

725 ILCS 5/116-3.....4

735 ILCS 5/2-1401.....4

735 ILCS 5/110-4, et seq.....6

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

Petitioner, Peter Assenato (hereafter, "defendant"), prays that a writ of certiorari issue to the Appellate Court of Illinois, First Judicial District, to review its judgment affirming the summary dismissal of defendant's petition for judgment of acquittal or a new trial based on newly-discovered evidence and actual innocence relative to defendant's previous conviction and sentence for murder.

Opinions and Orders Below

1. The [unreported] judgment ("Order") of the Illinois Appellate Court, First Judicial District, No. 1-99-2910, dated March 16, 2001, affirming the summary dismissal of defendant's petition for judgment of acquittal or a new trial based on newly-discovered evidence and actual innocence, is set out at App. A, pp. App. 1-11, in the Separate Volume Appendix.

2. The [unreported] Order of the Illinois Appellate Court, First Judicial District, No. 1-99-2910, dated May 2, 2001, denying petition for rehearing, is set out at App. B, p. App. 12, in the Separate Volume Appendix.

3. The [unreported] Order of the Illinois Supreme Court, No. 91613, dated June 29, 2001, denying petition for leave to appeal, is set out at App. C, p. App. 13, in the Separate Volume Appendix.

4. Other relevant Opinions and Orders entered in the case (Supreme Court Rule 14.1(i)(ii)), are also set out in the Separate Volume Appendix as:

APPENDIX D (pp. App. 14-25): Opinion of the Appellate Court of Illinois, First Judicial District, No. 1-89-2941, December 23, 1991, affirming defendant's conviction for murder, published at 224 Ill.App.3d 96, 586 N.E.2d 445, 166 Ill.Dec. 487 (1 Dist. 1991).

APPENDIX E (p. App. 26): [unreported] Order of the Appellate Court of Illinois, First Judicial District, No. 1-89-2941, January 8, 1992, denying petition for rehearing.

APPENDIX F (p. App. 27): [unreported] Order of the Illinois Supreme Court, No. 73111, March 27, 1992, denying petition for leave to appeal.

APPENDIX G (p. App. 28): [unreported] Order of the Circuit Court of Cook County, No. 88 CR 2648, July 6, 1994, dismissing defendant's post-conviction petition.

APPENDIX H (pp. App. 29-34): [unreported] Order of the Illinois Appellate Court, First Judicial District, No. 1-94-2459, November 20, 1995, affirming the dismissal of defendant's post-conviction petition.

APPENDIX I (p. App. 35): [unreported] Order of the Illinois Supreme Court, No. 80314, April 3, 1996, denying petition for leave to appeal.

APPENDIX J (pp. App. 36-53): [unreported] Memorandum Opinion and Order, United States District Court, Northern District of Illinois, Eastern Division, No. 97 C 2843, September 28, 1998, denying petition for writ of habeas corpus.

APPENDIX K (pp. App. 54-56): [unreported] Order of the United States District Court, Northern District of Illinois, Eastern Division, No. 97 C 2843, November 12, 1998, denying certificate of appealability.

APPENDIX L (pp. App. 57-58): [unreported] Order of the United States Court of Appeals for the Seventh Circuit, No. 98-3991, March 17, 1999, denying request for certificate of appealability.

5. The judgment sought to be reviewed is different from the date of the Order required in sub-subparagraph (i) (Supreme Court Rule 14.1(i)(iv).

[unreported] Order of the Circuit Court of Cook County, No. 88 CR 2648, July 27, 1999, dismissing defendant's petition for judgment of acquittal or new trial pursuant to 735 ILCS 5/2-1401, and actual innocence pursuant to 725 ILCS 5/116-3, as a post-conviction petition, thus it is set out at App, M, p. App. 59, of the Separate Volume Appendix.

Jurisdictional Statement

The judgment sought to be reviewed was entered by the Illinois Appellate Court on March 16, 2001. (App. A, p. App. 1) Rehearing was denied on May 2, 2001. (App. B, p. App. 12)

The Order of the Illinois Supreme Court denying petition for leave to appeal was entered on June 29, 2001. (App. C, p. App. 13)

Jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

Constitutional Provision Involved

The federal constitutional provision involved is the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Statement of Facts

On June 9, 1999, defendant filed a petition for judgment of acquittal or a new trial based on newly-discovered evidence and actual innocence. (App. A, p. App. 3)

Defendant asserted that the sole witness to offer any direct evidence against defendant, at defendant's jury trial for murder, admitted under oath to a retired Chicago police officer, now a private investigator, in the presence of a notary public, that he fabricated his trial testimony. (App. A, p. App. 3; C 13-16) Defendant attached the affidavit of the witness to the petition. (App. A, p. App. 3)

The witness, a drug user, died after admitting under oath that he fabricated his trial testimony, but before defendant filed his petition. (App. A, p. App. 3; see App. D, pp. App. 21, 23-24.)

Illinois statutory law allows for the admissibility of prior statements when a witness is deceased upon a showing of trustworthiness, and other circumstances. 735 ILCS 5/110-4, et seq.

Regardless, the trial court summarily dismissed defendant's petition

without allowing any hearing thereupon. (App. A, p. App. 3)

The Illinois Appellate Court affirmed because "recantations are often deemed highly unreliable." (App. A, p. App. 6)

The Illinois Supreme Court summarily denied review. (App. C, p. App. 13)

Defendant is respectfully seeking a writ of certiorari, with directions that Illinois allow a hearing on his claims of newly-discovered evidence and actual innocence.

Raising the Federal Question

A. In the court of first instance the federal question sought to be reviewed was raised at paragraph 3 of defendant's petition for judgment of acquittal or new trial based on newly discovered evidence and actual innocence, and throughout, passim.

B. In the Illinois Appellate Court, First Judicial District, the federal question sought to be reviewed was raised at page 3 of Appellant's Brief, and throughout, passim.

C. In the Illinois Supreme Court, the federal question sought to be reviewed was raised, throughout, passim, and at page 5 of defendant's petition for leave to appeal, with defendant "wondering how his actual innocence is somehow less significant than the actual innocence of the many other wrongfully convicted Illinois prisoners released after hearings on their claims?"

See also App. O, pp. App. 61-62.

REASONS FOR GRANTING CERTIORARI

Certiorari should be allowed, because the State trial and reviewing courts denied defendant a hearing to prove the reliability of evidence that proves his actual innocence -- the recantation of the State's "star" witness -- on the premise that recantation testimony is unreliable.

This violates Due Process as per the rule of Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297 (1973), that the reliability of a witness's extrajudicial statements must be tested by an evidentiary hearing.

The refusal of Illinois courts to allow defendant any hearing on his claims of newly-discovered evidence and actual innocence, including a recantation from the sole witness who provided any direct evidence against defendant, violates defendant's rights to substantive and procedural Due Process per the Fourteenth Amendment.

The State trial and reviewing courts denied defendant a hearing to prove the reliability of evidence that proves his actual innocence -- the recantation of the State's "star" witness -- on the premise that recantation testimony is unreliable.

(App A, p. App. 6)[1]

This violates Due Process as per the rule of Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297, 312 (1973), that the reliability of a witness's extrajudicial statements must be tested by an evidentiary hearing (even if that hearing is outside the presence of the jury).

This is an action from an Illinois prisoner asserting his actual innocence. Illinois courts are denying him any opportunity to have a hearing held on his claims of actual innocence.

Here, as shown below, there are specific violations of Due Process, overriding any purported state law rationalization for denying relief.[2]

This Court has held that Due Process requires the states to provide an avenue to process prisoners' claims of actual innocence. Herrera v. Collins,

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[1] The Illinois Appellate Court affirmed because "recantations are often deemed highly unreliable." (App. A, p. App. 6)

[2] Due Process prevails over state procedure. Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297, 312 (1973); Davis v. Alaska, 415 U.S. 308, 39 L.Ed. 2d 347 (1974). See p. 12, infra.

506 U.S. 390, 122 L.Ed.2d 203, 227 (1993).

"The Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Crane v. Kentucky, 476 U.S. 683, 690, 90 L.Ed.2d 636, 645 (1986), quoting from California v. Trombetta, 467 U.S. 479, 485, 81 L.Ed.2d 413 (1984). Every defendant charged with crime in the State courts has a federally protected constitutional right to present evidence in support of his defense. Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297 (1973); Washington v. Texas, 388 U.S. 14, 18 L.Ed.2d 1019 (1967). Indeed:

> "Few rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers, supra at 302, 35 L.Ed.2d at 312.

The refusal and failure to allow defendant the opportunity to be heard in court, is a discrete violation of Due Process here. Herrera v. Collins, supra.

Credibility determinations are not made for the first time in the appellate courts. Rogers v. Richmond, 365 U.S. 534, 5 L.Ed.2d 760, 769 (1961); accord, Morrison v. Mitchell, 96 Ill.App.2d 332, 239 N.E.2d 289, 290 (3 Dist. 1968).

Due Process prevails over state procedure. Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297, 312 (1973) (Due Process renders confession of third party admissible to exonerate defendant, despite state law bar). Accord, see Davis v. Alaska, 415 U.S. 308, 39 L.Ed. 2d 347 (1974) (Due Process requires allowing defendant to cross-examine "star" prosecution witness re juvenile record, despite state law sealing juvenile records).

The Illinois courts, in violation of Due Process as per Chambers, supra -- that **reliable evidence that proves actual innocence should be admitted**, even if such admission may violate a state procedure -- and in violation of this Court's holding in Rogers v. Richmond, supra -- that **credibility determinations are to be made by trial courts, not reviewing courts** -- refused to hold a hearing, to enable defendant an **opportunity** to demonstrate the **reliability** of the recantation of the major State witness, a witness so major that without him, there could not be a conviction.[3]

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[3] As in Chambers, where preventing defendant from contradicting the main State witness with prior contradictory statements, violated Due Process; so too here, preventing defendant from contradicting Losasso with Losasso's later statements, violates Due Process.

The State Appellate Court's position that Losasso's testimony was not the only evidence against defendant (App. A, pp. App. 7-8), misses the point. The other evidence is, in part, corroborative; but without Losasso's testimony, no conviction can be had.

The State Appellate Court's action, in justifying the denial of relief on a ground not asserted by the trial court (App. A, pp. App. 3-4) -- delay -- (App. A, pp. 4-5), violates Due Process, because it denies the defendant the right to respond to the assertions of the Appellate Court as to why the trial court did not need to hold a hearing to evaluate the credibility of the recantation. The essence of Due Process is notice and the opportunity to be heard. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 94 L.Ed. 865, 873 (1950); Davis v. Lane, 814 F.2d 397 (7 Cir. 1987).

Here, Due Process was denied when defendant was prevented from proving the credibility of the recantation -- i.e., proving that the evidence should have been admitted pursuant to Chambers.

Defendant respectfully prays for the opportunity to be heard in court; for a hearing.

CONCLUSION

For the foregoing reasons, certiorari should be allowed.

FREDERICK F. COHN
Attorney for Petitioner

DENNIS DOHERTY
Of Counsel

Dated: September __, 2001